Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

PATRICK ODELL MOORE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether, where a criminal defendant is charged in the *con*junctive with conspiracy to distribute marijuana *and* methamphetamine, but the trial judge instructs jurors in the *dis*junctive that to find the defendant guilty they must find a conspiracy to distribute marijuana *or* methamphetamine, constructive amendment of the indictment has occurred.

Whether a district court's dismissal of two of four crimes alleged in one count of an indictment violates a defendant's Fifth Amendment rights under the Grand Jury Clause.

Whether Petitioner was denied a fair trial when the district court failed to dismiss count II of his indictment which was concededly based on false grand jury testimony.

TABLE OF CONTENTS

Page

Questions Presented i

Table of Contents..... ii

Table of Cited Authorities iv

Opinions Below 1

Jurisdiction..... 1

Statement of the Case 1

Reasons Relied on for Allowance of the Writ 5

I. THE DISTRICT COURT CONSTRUCTIVELY AMENDED THE INDICTMENT WHEN IT INSTRUCTED JURORS IN THE DISJUNCTIVE THAT TO FIND MOORE GUILTY THEY MUST FIND A CONSPIRACY TO DISTRIBUTE MARIJUANA *OR* METHAMPHETAMINE 5

II. THE DISTRICT COURT, IN DISMISSING TWO OF FOUR CRIMES CHARGED IN COUNT I, HELD PETITIONER TO ANSWER FOR A CRIME DIFFERENT FROM THAT FOR WHICH HE WAS INDICTED, IN VIOLATION OF THE FIFTH AMENDMENT'S GRAND JURY CLAUSE 8

III. THE DISTRICT COURT'S FAILURE TO DISMISS COUNT II BASED ON FALSE GRAND JURY TESTIMONY VIOLATED PETITIONER'S RIGHT TO A FAIR TRIAL..... 9

Conclusion 12

Appendix.....App. 1

TABLE OF CONTENTS – Continued

Page

Appendix A United States of America v. Patrick Odell Moore, 184 F.3d 790 (8th Cir. 1999) ..... App. 1

Appendix B Judgment in a Criminal Case, United States District Court for the Southern District of Iowa, January 19, 1999 ..... App. 9

Appendix C Order Denying Petition for Rehearing and for Rehearing En Banc, United States Court of Appeals for the Eighth Circuit, No. 99-1229SIDM, October 8, 1999..... App. 21

TABLE OF AUTHORITIES

Page

CASES

Chapman v. United States, 500 U.S. 453, 111 S.Ct. 1919, 114 L.Ed.2d 524 (1991) 5

Stirone v. United States, 361 U.S. 212 (1960) 8

Truchinski v. United States, 393 F.2d 627 (8th Cir. 1968) 11

United States v. Asurto, 497 F.2d 781 (9th Cir. 1974) 11

United States v. Fruchtman, 421 F.2d 1019 (6th Cir.), *cert. denied*, 400 U.S. 849 (1970) 8

United States v. Leisure, 844 F.2d 1347 (8th Cir. 1988) 8

United States v. Levine, 700 F.2d 1176 (8th Cir. 1983) 11

United States v. Lueth, 807 F.2d 719 (8th Cir. 1986) ...6, 7

United States of America v. Patrick Odell Moore, 184 F.3d 790 (8th Cir. 1999) 1, 4, 10

United States v. Neff, 525 F.2d 361 (8th Cir. 1975) ...8, 9

United States v. Denny, 165 F.2d 688 (7th Cir. 1947), *cert. denied*, 332 U.S. 824 (1947) 9

United States v. Regans, 125 F.3d 685 (8th Cir. 1997), *cert. denied*, ___ U.S. ___, 118 S.Ct. 1398, 140 L.Ed.2d 656 (1998) 5

United States v. Thompson, 576 F.2d 784 (9th Cir. 1978) 11

United States v. Waggoner, 103 F.3d 724 (8th Cir. 1997) 5

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

Title 18 U.S.C. § 3231 1

Title 18 U.S.C. § 3742(a) 2

Title 21 United States Code, Section 841(a)(1) 2, 5

Title 21, United States Code, Section 846 .....3, 5

Title 21, United States Code, Section 856 2

Title 21, United States Code, Section 856(a)(2) 3, 10

Title 28, United States Code, Section 1254(1) 1

OPINIONS BELOW

On January 19, 1999, the United States District Court for the Southern District of Iowa, the Honorable Charles R. Wolle, filed its Judgment in a Criminal Case. (Appendix B).

On August 24, 1999, in *United States v. Patrick Odell Moore*, 184 F.3d 790 (8th Cir. 1999), the United States Court of Appeals for the Eighth Circuit affirmed Petitioner's conviction and sentence. (Appendix A).

On October 8, 1999, the United States Court of Appeals for the Eighth Circuit denied Petitioner's Petition for Rehearing and Rehearing En Banc. (Appendix C).

JURISDICTION

On August 24, 1999, in *United States v. Patrick Odell Moore*, 184 F.3d 790 (8th Cir. 1999), the United States Court of Appeals for the Eighth Circuit affirmed Petitioner's conviction and sentence. (Appendix A). On October 8, 1999, the United States Court of Appeals for the Eighth Circuit denied Petitioner's Petition for Rehearing and Rehearing En Banc. (Appendix C). This Court's jurisdiction is invoked pursuant to Title 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

The jurisdiction of the United States District Court for the Northern District of Iowa was pursuant to Title 18 U.S.C. § 3231. The jurisdiction of the United States Court

of Appeals for the Eighth Circuit was invoked pursuant to Title 18 U.S.C. § 3742(a).

Petitioner and several other individuals were indicted for having participated in a drug distribution conspiracy lasting approximately fourteen months. Petitioner's role in the conspiracy was alleged to be twofold: (1) the house he shared with his ex-wife, a primary co-conspirator, served as the storage facility for the drugs; and (2) he helped on occasion to unload the drug shipments once the co-conspirators delivered them to the house.

It is uncontested that United States Drug Enforcement Agent Deist made false statements before the grand jury. He incorrectly testified that Moore and his ex-wife, a co-conspirator, were married. He also falsely testified that Moore and his ex-wife gave another co-conspirator a key to a storage room on their property.

The government charged Petitioner with two counts. Count I of the Second Superseding Indictment charged Petitioner:

> did knowingly and intentionally, combine, conspire, confederate, and agree and join an understanding together and with persons known and unknown to the grand jury to knowingly and intentionally distribute, and manufacture marijuana, a Schedule I Controlled Substance, methamphetamine, a Schedule II Controlled Substance, *and* cocaine, a Schedule II Controlled Substance, in violation of title 21 United States Code, Section 841(a)(1) *and* Establishment of a Manufacturing Operation, in violation of title 21, United States Code, Section 856. This is a

> violation of Title 21, United States Code, Section 846.

Second Superseding Indictment, pp. 1-2 (emphasis added). Count II charged Petitioner with managing or controlling a building for the unlawful purpose of storing, distributing, or using a controlled substance, in violation of 21 U.S.C. § 856(a)(2). At the close of evidence, Petitioner moved the trial court for a judgment of acquittal. The court dismissed two parts of count I, leaving under count I only conspiracy to distribute marijuana and conspiracy to distribute methamphetamine. Although count I, as submitted to the jury, alleged conspiracy to distribute marijuana *and* conspiracy to distribute methamphetamine, in the *con*junctive, Jury Instruction No. 18 was presented in the *dis*junctive, stating that in order to find Petitioner guilty on count I, the jury had only to agree he conspired to commit "one or both of the two offenses." The verdict form was then stated in the *con*junctive.

The jury convicted Petitioner on both counts. After trial, Petitioner filed motions for a judgment of acquittal and for a new trial, both of which were denied. The district court sentenced Petitioner to 121 months' imprisonment.

On appeal to the Eighth Circuit, Petitioner argued that 1) his right to a fair trial was violated by the district court's failure to sustain his objection to Jury Instruction No. 18 being inconsistent with the Verdict Forms; 2) his right to a fair trial was violated by the district court's failure to grant his request for dismissal of count II as being based on false grand jury testimony; 3) his right to

a fair trial was violated by the district court's failure to grant his Motion for New Trial; 4) his Fourth Amendment rights were violated by the district court's failure to suppress improperly seized evidence from his residence; and 5) the district court erred in failing to grant downward departures under the aberrant behavior, minimal participant and safety valve provisions of the United States Sentencing Guidelines.

The Eighth Circuit held that count I was not duplicitous, that the basis upon which Moore could be convicted was not changed or expanded by the district court's striking parts of count I and that the district court did not constructively amend the indictment by instructing jurors in the disjunctive. *Moore*, 184 F.3d at 793-94. The Circuit additionally held that while it was uncontested that a police officer made misstatements before the grand jury, the misstatements were not material and did not justify dismissal. *Id.* at 794. Finally, the Circuit found that a two-level increase under U.S.S.G. § 2D1.1(b)(1) for possession of a firearm was justified and dictated Moore's ineligibility under the "safety valve" provision. *Id.* at 795. The Circuit declined to substantively address the remainder of Moore's claims, finding them without merit.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

I. THE DISTRICT COURT CONSTRUCTIVELY AMENDED THE INDICTMENT WHEN IT INSTRUCTED JURORS IN THE DISJUNCTIVE THAT TO FIND MOORE GUILTY THEY MUST FIND A CONSPIRACY TO DISTRIBUTE MARIJUANA *OR* METHAMPHETAMINE.

Count I charged Petitioner with conspiracy to distribute cocaine, distribute methamphetamine, manufacture marijuana, *and* distribute marijuana, in violation of 21 U.S.C. §§ 841(a)(1) and 846.

The term "and" as used in count I of Petitioner's Indictment should be given its ordinary meaning. *See Chapman v. United States*, 500 U.S. 453, 454, 111 S.Ct. 1919, 114 L.Ed.2d 524 (1991); *United States v. Regans*, 125 F.3d 685, 686 (8th Cir. 1997), *cert. denied*, ___ U.S. ___, 118 S.Ct. 1398, 140 L.Ed.2d 656 (1998); *United States v. Waggoner*, 103 F.3d 724, 726 (8th Cir. 1997). Websters Dictionary defines "and" as "also," "in addition," "moreover," or "as well as." Websters New Universal Unabridged Dictionary, 67 (1979). Websters defines "or" as "a co-ordinating conjunction introducing an alternative." *Id.* at 1257. The same dictionary includes the term "and/or" to mean "either 'and' or 'or,' according to what applies," *Id.* at 68, which is what the government should have used in count I if it intended to hold Petitioner accountable for conspiracy under all or any of a number of theories.

The district court and Eighth Circuit have given the term "and" as used in Petitioner's Indictment a meaning anything but ordinary. They hold in essence that the

Government and courts may say one thing and mean the direct opposite – and that it is the responsibility of defendants and jurors to know the difference. There is no justification for the Government's use of the term "and" in count I of Petitioner's Indictment and the district court's subsequent use of "or" in Jury Instruction No. 18, and indeed neither the district court nor the Eighth Circuit attempts to rationalize the blatant misuse of the terms in this case or substantively addresses the confusion created by the misuse. Instead, they hold that the terms "and" and "or" are interchangeable, the choice of one over the other having no substantive effect:

> In [*United States v.*] *Lueth*[, 807 F.2d 719, 733 (8th Cir. 1986)], a case similar to the present one, the defendant was charged in the conjunctive with conspiracy to distribute marijuana and cocaine. The trial judge, however, instructed the jury in the disjunctive, instructing them that to find the defendant guilty, they must find a conspiracy to distribute marijuana or cocaine, or both. *See id.* at 733. We held that this instruction did not permit the jury to convict the defendant of an offense different from that charged in the indictment. *See id.* at 733-34. The offense charged was conspiracy to distribute a controlled substance, and Lueth could have committed this offense with either marijuana or cocaine. *See id.* at 734. Moore's argument necessarily fails for the same reason.

Moore, 184 F.3d at 793.

The inconsistent use of the term "and" in Petitioner's Indictment and "or" in Jury Instruction No. 18 in fact reduced the Government's burden by *one half*. Petitioner

was notified in plain terms in count I of his indictment that the Government was charging him in the conjunctive. Nowhere has the Government alleged it was not free to choose the disjunctive. The district court then decided, contrary to the ordinary meaning of the terms of the Indictment, that rather than proving Petitioner conspired to distribute marijuana *and* methamphetamine, the Government need only prove he conspired to distribute one or the other. The district court's Jury Instruction No. 18 permitted the jury to convict Petitioner of an offense different from that charged in the Indictment. Had the Indictment charged Petitioner with conspiracy to distribute marijuana *or* methamphetamine, or both, his conviction based on one or the other would have been consistent with the Indictment.

The inconsistency between Petitioner's Indictment and Jury Instruction No. 18 was so confusing and prejudicial (*see United States v. Lueth*, 807 F.2d 719, 733 (8th Cir. 1986) ("jury submitted following question to trial judge: '[t]here is disagreement among the jurors . . . [i]n order for a defendant to be found guilty . . . must he/she be found guilty re: both marijuana and cocaine or can it be only one or the other?' "), bringing into question to fairness and integrity of the judicial process, as to deny Petitioner his right to a fair trial.

II. THE DISTRICT COURT, IN DISMISSING TWO OF FOUR CRIMES CHARGED IN COUNT I, HELD PETITIONER TO ANSWER FOR A CRIME DIFFERENT FROM THAT FOR WHICH HE WAS INDICTED, IN VIOLATION OF THE FIFTH AMENDMENT'S GRAND JURY CLAUSE.

The Fifth Amendment states "[n]o person shall be held to answer for an . . . infamous crime, unless on presentment or indictment of a grand jury." U.S. Const. amend. V. The variance between the broad allegations against Petitioner contained in the Second Superseding Indictment and the narrower proof at trial violated Petitioner's right to have had a grand jury screen any alleged offenses upon which he might be convicted at trial. Although no additional language was added to the indictment by the district court, the court significantly modified count I by elimination of two of four crimes alleged (a circumstance exacerbated by the fact that the Indictment as a whole was based on false testimony).

Any change in an indictment must be in form only. *See Stirone v. United States*, 361 U.S. 212 (1960); *United States v. Leisure*, 844 F.2d 1347, 1365 (8th Cir. 1988). The district court's elimination of two of four crimes alleged in count I was *substantive*. The government had chosen to present count I in the conjunctive. By eliminating two of the four crimes alleged in count I the district court substantially reduced the government's burden of proof – by one half. This type of modification is inconsistent with those that have been held to be acceptable. *See United States v. Neff*, 525 F.2d 361, 363 (8th Cir. 1975) (typographical error in indictment corrected); *United States v. Fruchtman*, 421 F.2d 1019 (6th Cir.) (change in citation of a

statute), *cert. denied*, 400 U.S. 849 (1970); *United States v. Denny*, 165 F.2d 688 (7th Cir. 1947) (change in spelling of defendant's name), *cert. denied*, 332 U.S. 824 (1947).

It is extremely unlikely that the grand jury would have returned an indictment against Petitioner had the indictment reflected the proof at trial and had Agent Deist testified truthfully before the grand jury. To allow the government to secure indictments in this manner – by grossly inflating the charges and offering false testimony – is to effectively dispense with those safeguards provided under the Fifth Amendment's Grand Jury Clause. "[A]ny amendment of the substance of an indictment without resubmission to the grand jury denies a defendant his right to indictment by grand jury for infamous crimes." *Neff*, 525 F.2d at 363. The amendment of Petitioner's Indictment was substantive and outside of the district court's power to make absent resubmission to the grand jury.

III. THE DISTRICT COURT'S FAILURE TO DISMISS COUNT I BASED ON FALSE GRAND JURY TESTIMONY VIOLATED PETITIONER'S RIGHT TO A FAIR TRIAL.

Following presentation of the government's case in chief, during which Agent Deist admitted he made false statements to the grand jury, Petitioner moved for dismissal of count II.

Deist admitted at trial that he testified to the grand jury that Petitioner was married to Marlas Moore, who in fact was his ex-wife. He further admitted to testifying

that both Petitioner and Ms. Moore had given a codefendant a key to a storage room on property jointly owned by Petitioner and Ms. Moore. That property was the subject matter of count II of the Second Superseding Indictment alleging Petitioner managed or controlled a building for the unlawful purpose of storing, distributing, or using a controlled substance, in violation of 21 U.S.C. § 856(a)(2). Agent Deist's ten minute testimony to the grand jury focused on the relationship of the codefendants, access to the property in question and the ownership of the property.

The Eighth Circuit, conceding that the "misstatements" were made, held that the misstatements were immaterial mistakes:

> [I]n order to have a charge dismissed for an alleged misstatement or even a perjurious statement, Moore must show that the misstatements were material. As long as there is some other competent evidence to sustain the charge, the charge should not be dismissed. Here, it was immaterial whether Moore and his ex-wife were married or not. As for the key given to the coconspirator, there was sufficient other evidence to support the charge against Moore, including his knowledge that the drugs were stored in his house and the fact that he personally unloaded the drug shipments at his house. Thus, the district court did not abuse its discretion in denying Moore's motion to dismiss count II.

Moore, 184 F.3d at 794 (citations omitted).

The Eighth Circuit's hasty dismissal of the misstatements as immaterial ignores the nature of count II – *managing* or *controlling* a building *for the unlawful purpose*

of storing, distributing, or using a controlled substance. Agent Deist presented Petitioner and Ms. Moore as having a close, marital relationship, imputing Ms. Moore's knowledge of the conspiracy to Petitioner, when in fact the two were staying in different parts of the house and it was Ms. Moore who spent most of her time working with the main co-conspirators. Petitioner, on the other hand, was employed full time at the Mansanto Company in Muscatine, Iowa, and had been for the last 22 years. And Agent Deist's false testimony that Petitioner gave a key to the storage area in the house to a co-conspirator goes straight to the issues of management and control, a *central* element of Count II.

When statements made to a grand jury are material to the offense charged, the indictment must be dismissed. *See United States v. Levine*, 700 F.2d 1176, 1180 (8th Cir. 1983) (*citing Truchinski v. United States*, 393 F.2d 627, 633 (8th Cir. 1968). The court must look to other evidence that was available to clarify and present accurate information to the grand jury. *See United States v. Thompson*, 576 F.2d 784, 786 (9th Cir. 1978); *United States v. Asurto*, 497 F.2d 781, 785-86 (9th Cir. 1974). Here, the Eighth Circuit failed altogether to look at other evidence. Had it, it would have found none. Agent Deist was the sole grand jury witness with respect to count II. The grand jury transcript of his testimony was a mere 10 pages. There was *no* other evidence available to clarify Agent Deist's false, and material, testimony, and as such Count II should have been dismissed and the Eighth Circuit's ruling should be reversed.

CONCLUSION

Mr. Moore requests the Court grant writ of certiorari to resolve the above important issues of law heretofore unaddressed by the Court.

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APPENDIX

		Page
Appendix A	United States of America v. Patrick Odell Moore, 184 F.3d 790 (8th Cir. 1999)	App. 1
Appendix B	Judgment in a Criminal Case, United States District Court for the Southern District of Iowa, January 19, 1999	App. 9
Appendix C	Order Denying Petition for Rehearing and for Rehearing En Banc, United States Court of Appeals for the Eighth Circuit, No. 99-1229SIDM, October 8, 1999	App. 21

APPENDIX A

UNITED STATES of America, Appellee,

v.

Patrick Odell MOORE, Appellant.

No. 99-1229.

United States Court of Appeals, Eighth Circuit.

Submitted: June 17, 1999.

Filed: Aug. 24, 1999.

Rehearing and Rehearing En Banc Denied Oct. 8, 1999.

Alfredo Parrish, Des Moines, Iowa, argued, for Appellant.

Richard D. Westphal, Assistant U.S. Attorney, Rock Island, Illinois, argued, for Appellee.

Before: MURPHY and MAGILL, Circuit Judges, and REASONER,* District Judge.

MAGILL, Circuit Judge.

Patrick Moore was convicted on one count of conspiracy to distribute marijuana and methamphetamine, and one count of managing or controlling a building for the purpose of storing or distributing a controlled substance. Moore appeals both his conviction and his sentence, and we affirm.

---

* The Honorable Stephen M. Reasoner, United States District Judge for the Eastern District of Arkansas, sitting by designation.

I.

Patrick Moore and several other individuals participated in a drug distribution conspiracy which lasted for approximately fourteen months. Moore's role in the conspiracy was twofold: (1) his house served as the storage facility for the drugs, which included marijuana and methamphetamine; and (2) he helped unload the drug shipments once the coconspirators delivered them to his house.

On June 26, 1997, police officers executed a search warrant on Moore's home. In the course of executing the search warrant, police found 274 grams of methamphetamine in the upstairs dining room area and twenty pounds of marijuana in the downstairs basement. In Moore's bedroom, police found a loaded handgun under the pillow, several other handguns and a shotgun, and small amounts of methamphetamine and marijuana.

The government charged Moore with two counts. Count I charged Moore with conspiracy to distribute cocaine, distribute methamphetamine, manufacture marijuana, and distribute marijuana, in violation of 21 U.S.C. §§ 841(a)(1) and 846. Count II charged him with managing or controlling a building for the unlawful purpose of storing, distributing, or using a controlled substance, in violation of 21 U.S.C. § 856(a)(2). During trial, the court dismissed two parts of count I – conspiracy to distribute cocaine and conspiracy to manufacture marijuana – leaving just conspiracy to distribute marijuana and conspiracy to distribute methamphetamine on count I. The jury convicted Moore on both counts.

After trial, Moore filed motions for a judgment of acquittal and for a new trial, both of which the district court denied. The court sentenced Moore to 121 months' imprisonment and five years' supervised release.

II.

Moore first challenges his conviction on count I. Count I, as submitted to the jury, alleged a conspiracy to distribute marijuana and methamphetamine. The jury instructions, however, were presented in the disjunctive, stating that in order to find Moore guilty on count I, the jury had to find that he conspired to distribute marijuana or methamphetamine. Moore argues that (1) count I was duplicitous because conspiracy to distribute marijuana and conspiracy to distribute methamphetamine are two different offenses, and (2) the district court constructively amended the indictment by striking parts of count I and instructing the jury in the disjunctive on the remaining parts of count I.

We do not agree with Moore that count I was duplicitous. " 'Duplicity' is the joining in a single count of two or more distinct and separate offenses." *United States v. Street*, 66 F.3d 969, 974 (8th Cir.1995) (quotation marks omitted). The risk behind a duplicitous charge is that a jury may convict the defendant without unanimous agreement on a particular offense. *See id.* Duplicity concerns are not present, however, when the underlying statute is one which merely enumerates one or more ways of committing a single offense. *See id.* In that case, all of the different ways of committing that same offense may be alleged in the conjunctive in one count, and proof of

any one of the enumerated methods will sustain a conviction. *See id., see also United States v. Lueth,* 807 F.2d 719, 733 (8th Cir.1986). Here, count I charged Moore with committing one offense, conspiracy to distribute a controlled substance, in two ways, with marijuana and methamphetamine. Enumerating the controlled substances did not render count I duplicitous. *See id.* at 734.

We likewise reject Moore's argument that the district court constructively amended the indictment. A constructive amendment of an indictment occurs when a jury is allowed to convict a defendant of an offense different from or in addition to the offense alleged in the indictment. *See United States v. Begnaud,* 783 F.2d 144, 147 (8th Cir.1986); *Lueth,* 807 F.2d at 733-34. In *Lueth,* a case similar to the present one, the defendant was charged in the conjunctive with conspiracy to distribute marijuana and cocaine. The trial judge, however, instructed the jury in the disjunctive, instructing them that to find the defendant guilty, they must find a conspiracy to distribute marijuana or cocaine, or both. *See id.* at 733. We held that this instruction did not permit the jury to convict the defendant of an offense different from that charged in the indictment. *See id.* at 733-34. The offense charged was conspiracy to distribute a controlled substance, and Lueth could have committed this offense with either marijuana or cocaine. *See id.* at 734. Moore's argument necessarily fails for the same reasons.

We also conclude that the court's striking parts of count I did not constitute an amendment of the indictment because the court's action did not expand the bases upon which Moore could be convicted, nor did it change

the offense. *See Begnaud*, 783 F.2d at 147. Thus, we find no error in Moore's conviction on count I.

III.

Moore next contends that the district court should have dismissed count II because the police officer who testified before the grand jury regarding count II, Agent Deist, made false statements to the grand jury. We review the district court's denial of a motion to dismiss an indictment based on evidence presented to the grand jury for an abuse of discretion. *See United States v. Levine*, 700 F.2d 1176, 1181 (8th Cir.1983).

It is uncontested that Deist made misstatements before the grand jury. He mistakenly testified that Moore and his ex-wife, a coconspirator, were married.[1] He also mistakenly testified that Moore and his ex-wife gave another coconspirator a key to a storage room on their property. However, these statements were made based on Deist's belief at the time, and misstatements or mistakes alone do not justify the dismissal of an otherwise valid charge. *See United States v. Johnson*, 767 F.2d 1259, 1275 (8th Cir.1985); *Levine*, 700 F.2d at 1180. Moreover, in order to have a charge dismissed for an alleged misstatement or even a perjurious statement, Moore must show that the misstatements were material. *See id.* As long as there is some other competent evidence to sustain the charge, the charge should not be dismissed. *See id.* Here, it was

---

[1] During the relevant time period, Moore and his ex-wife, Marlas Moore, were divorced; however, they lived together in Moore's home.

immaterial whether Moore and his ex-wife were married or not. As for the key given to the coconspirator, there was sufficient other evidence to support the charge against Moore, including his knowledge that drugs were stored in his house and the fact that he personally unloaded the drug shipments at his house. Thus, the district court did not abuse its discretion in denying Moore's motion to dismiss count II.

IV.

Moore argues that the district court erred in assigning a two-level increase under U.S.S.G. § 2D1.1(b)(1) for possession of a firearm. He also argues that the court erred in finding him ineligible for the "safety valve" provision, U.S.S.G. § 5C1.2, because he possessed a firearm in connection with the offense. We review the district court's determination that a weapon was sufficiently connected to the offense under § 2D1.1(b)(1) and § 5C1.2(2) for clear error. *See United States v. Coleman*, 148 F.3d 897, 904 (8th Cir.), *cert. denied*, ___ U.S. ___, 119 S.Ct. 228, 142 L.Ed.2d 188 (1998); *United States v. Belitz*, 141 F.3d 815, 817 (8th Cir.1998).

Section 2D1.1 of the Sentencing Guidelines provides for a two level increase "[i]f a dangerous weapon (including a firearm) was possessed." U.S.S.G. § 2D1.1(b)(1). The government bears the burden of showing by a preponderance of the evidence that a weapon was present and that it is not clearly improbable that the weapon was connected with the offense. *See Belitz*, 141 F.3d at 817; *see also* U.S.S.G. § 2D1.1(b)(1) comment. (n. 3). The government can show that a weapon is connected with the

offense by establishing a temporal and spatial relation between the weapon, the defendant, and the drugs. *See United States v. Payne*, 81 F.3d 759, 763 (8th Cir.1996).

In this case, police found several firearms in Moore's bedroom, including a loaded weapon under Moore's pillow. Police also found a small quantity of drugs in his bedroom, a large quantity of methamphetamine in the next room, and twenty pounds of marijuana in the basement. This constitutes a sufficient temporal and spatial relation between Moore, the weapons, and the drugs. *See Belitz*, 141 F.3d at 817-18 (upholding § 2D1.1(b)(1) increase where defendant had loaded gun in living room, gun was easily accessible, and drugs were located in basement).

Our conclusion that the increase under § 2D1.1(b)(1) was proper dictates our conclusion that Moore was ineligible for the "safety valve" provision under § 5C1.2(2). *See Coleman*, 148 F.3d at 903-04 (applying the "clearly improbable" standard of § 2D1.1(b)(1) in evaluating eligibility for "safety valve" decrease under § 5C1.2(2)); *see also United States v. Smith*, 175 F.3d 1147, 1149 (9th Cir.1999) ("[E]very circuit to consider the issue has held that conduct which warrants an increase in sentence under § 2D1.1(b)(1) necessarily defeats application of the safety valve."). Thus, the district court did not err in assigning a two-level increase for possessing a weapon and in denying the "safety valve" decrease.

V.

Moore raises several additional claims related to his conviction and sentence. We have carefully considered

each of these claims, and conclude they are without merit. *See* 8th Cir.R. 47B. Accordingly, we affirm the decision of the district court.

APPENDIX B

UNITED STATES DISTRICT COURT

SOUTHERN District of IOWA

(Filed Jan. 19, 1999)

UNITED STATES OF AMERICA

V.

PATRICK ODELL MOORE

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1998)
CASE NUMBER: 4-97-cr-184

Alfredo Parrish
Defendant's Attorney

THE DEFENDANT:

[ ] pleaded guilty to count(s) _____

[ ] pleaded nolo contendere to count(s) _____ which was accepted by the court.

[X] was found guilty on count(s) one and two after a plea of not guilty

Title & Section	Nature of Offense
21:846	Conspiracy to distribute marijuana, methamphetamine, and cocaine

Date Offense Concluded	Count Number
06/24/1997	one

Title & Section	Nature of Offense
21:856(a)(2)	Maintain a residence to distribute marijuana and methamphetamine

Date Offense Concluded	Count Number
06/24/1997	two

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[ ] The defendant has been found not guilty on count(s) _____

[ ] Count(s) _____ (is) (are) dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 492-56-1634

Defendant's Date of Birth: 04/21/1951

Defendant's USM No.: 12305-030

Defendant's Residence Address: Unknown

Defendant's Mailing Address: Unknown

January 15, 1999
Date of Imposition of Judgment

/s/ Charles R. Welle
Signature of Judicial Officer

Charles R. Welle, Chief Judge
Name and Title of Judicial Officer

January 19, 1999
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned a total term of one hundred twenty-one (121) months on each of Counts one and two, with terms to be served concurrently.

[ ] The court makes the following recommendations to the Bureau of Prisons:

[X] The defendant is remanded to the custody of the United States Marshal.

[ ] The defendant shall surrender to the United States Marshal for this district:

[ ] at ____ a.m./p.m. on _____.

[ ] as notified by the United States Marshal.

[ ] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

[ ] before 2 p.m. on _____.

[ ] as notified by the United States Marshal.

[ ] as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____ at _____ with a certified copy of this judgment.

_____

UNITED STATES MARSHAL

By _____

Deputy U.S. Marshal

SUPERVISED RELEASE

Upon release for imprisonment, the defendant shall be on supervised release for a term of five (5) years on Count one and two (2) years on Count two, with the terms to run concurrently.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

[ ] The above drug testing condition is suspended based on the court's determination that the

defendant posed a low risk of future substance abuse. (Check, if applicable.)

[X] The defendant shall not possess a firearm as defined in 18 U.S.C. § 921. (Check, if applicable.)

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report with the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit conficastion of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

ADDITIONAL STANDARD CONDITIONS OF SUPERVISION

The defendant shall submit to a substance abuse evaluation. If treatment is recommended, the defendant shall participate in a program of testing and treatment for substance abuse, as directed by the Probation Officer, until such time as he is released from the program by the Probation Office. He shall not use drugs, alcohol and/or other intoxicants while on supervised release.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

Totals:	Assessment	Fine	Restitution
	$ 200.00	$	$

[ ] If applicable, restitution amount ordered pursuant to plea agreement ..... $_____

FINE

The above fine includes costs of incarceration and/or supervision in the amount of $_____

The defendant shall pay interest on any fine more than $2,500, unless the fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(l). All of the payment options on Sheet 5, Part B may be subject to penalties for defendant and delinquency pursuant to 18 U.S.C. § 3612(g).

[ ] The court has determined that he defendant does not have the ability to pay interest and it is ordered that:

[ ] The interest requirement is waived.

[ ] The interest requirement is modified as follows:

RESTITUTION

[ ] The determination of restitution is deferred until _____. An Amended Judgment in a Criminal Case will be entered after such a determination.

[ ] The defendant shall make restitution to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority order of percentage payment column below.

Name of Payee	*Total Amount of Loss	Amount of Restitution Ordered	Priority Order or Percentage of Payment
Totals:	$_____	$_____	

*Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994 but before April 23, 1996.

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost protection; (5) interest; (6) penalties.

Payment of the total fine and other criminal monetary penalties shall be due as follows:

A [X] In full immediately; or

B [ ] $_____ immediately, balance due (in accordance with C, D, or E); or

C [ ] not later than_____; or

D [ ] in installments to commence ____ days after the date of this judgment. In the event the entire amount of criminal monetary penalties imposed is not paid prior to the commencement of supervision, the U.S. probation officer shall pursue collection of the amount due, and shall request the court to establish a payment schedule appropriate; or

E [ ] in ____ (*e.g., equal, weekly, monthly, quarterly*) installments of $_____ over a period of _____ years(s) to commence _____ days after the date of this judgment.

The defendant will receive credit for all payments previously made toward any criminal monetary penalties imposed.

Special instructions regarding the payment of criminal monetary penalties:

All criminal monetary penalty payments are to be made to the Clerk's Office, U. S. District Court, P. O. Box 9344, Des Moines, Iowa 50306-9344.

[ ] Joint and Several

[ ] The defendant shall pay the cost of prosecution.

[ ] The defendant shall pay the following court cost(s):

[ ] The defendant shall forfeit the defendant's interest in the following property to the United States:

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments, except those payments made through he Bureau of Prisons' Inmate Financial Responsibility Program are to be made as direct by the court, the probation officer, or the United States attorney.

STATEMENT OF REASONS

[ ] The court adopts the factual findings and guideline application in the presentence report.

OR

[X] The court adopts the factual finding and guideline application in the presentence report except (see attachment if necessary): The Court grants a 2 level reduction for role in the offense.

Guideline Range Determined by the Court:

Total Offense Level: 32

Criminal History Category: I

Imprisonment Range: 121 to 151 months

Supervised Release Range: 5 years

Fine Range: $17,500.00 to $4,000,000.00

[X] Fine waived or below the guideline range because of inability to pay.

Total Amount of Restitution: $_____

[ ] Restitution is not ordered because the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order outweighs the need to provide restitution to any victims, pursuant to 18 U.S.C. § 3663(d).

[ ] For offenses committed on or after September 13, 1994 but before April 23, 1996 that require the total amount of loss to be stated, pursuant to Chapters 109A, 110, 110A, and 113A of Title 18, restitution is not ordered because the economic circumstances of the defendant do not allow for the payment of any amount of a restitution order and do not allow for the payment of any or some portion of a restitution order in the foreseeable future under any reasonable schedule of payments.

[ ] Partial restitution is ordered for the following reason(s):

[ ] The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by the application of the guidelines.

OR

[X] The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reasons:

A sentence near the bottom of the guideline range will serve all purposes of sentencing.

OR

[ ] The sentence departs from the guideline range:

[ ] upon motion of the government, as a result of defendant's substantial assistance.

[ ] for the following specific reason(s):

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 99-1229SIDM

United States of America,	*	
	*	
Appellee,	*	Order Denying Petition
v.	*	for Rehearing and for
	*	Rehearing En Banc
Patrick Odell Moore,	*	
	*	
Appellant.	*	

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

(5128-010199)

October 8, 1999

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit